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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RONALD CAVALE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the trial court's oral admonitions to the petitioner and his trial counsel cautioning them of the possibly severe consequences that may result from the petitioner testifying in his own behalf at trial deprived the petitioner of due process of law and assistance of counsel for his defense.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered September 7, 1982 and is attached hereto as Appendix A at pages A-1 to A-26.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered September 7, 1982.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Seventh Circuit under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

Amendment VI to the United States Constitution provides in pertinent part: "In all criminal proceedings the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner, Ronald Cavale, was charged in twelve counts of a seventy-two count indictment with having committed the offense of "mail fraud" in violation of 18 U.S.C. 1341. He entered pleas of not guilty, was subsequently tried jointly with seven co-defendants and convicted by a jury.[1]

The indictment charged that the defendants were participants in a series of schemes to defraud the City of Chicago by submitting to its Police Department fraudulent billing from a private vendor for repair work to Police Department motor vehicles.

The private vendor, Mar-lin Automotive (Marlin), had been awarded a contract by the City to perform the work. Before work was performed, it was authorized by Police Department employees. After the work was completed and at regular monthly intervals Marlin Automotive submitted its billing to the Police Department for work completed. A Police Department employee examined the billing and approved or disapproved it. If approved, the billing was transmitted to the City Comptroller. The City would then issue its check and deliver it to Marlin via U.S. mail.

The evidence adduced at trial showed that a significant percentage of the billing submitted to the Police Department was fraudulent in that it was for work which Marlin never, in fact, performed or was inflated to repre-

[1] One of the seven co-defendants changed his plea to guilty during the course of the trial. Two other defendants were named in the indictment. Both entered pleas of guilty prior to trial.

sent a greater amount of work than Marlin actually performed. The schemes involved Police Department employees and the owners of Marlin. The Department employees authorized work that Marlin was never expected to complete because the work was never presented to Marlin or because the work that was presented was conspicuously less than that authorized. The Police Department employee who authorized the fraudulent work received a "split" of the amount authorized. The "split" was paid by one of Marlin's owners to the Police Department employee.[2]

An additional scheme had as its participants the owners of Marlin and the Police Department official in charge of approving all billing submitted to it (Kovic). Kovic received a fixed percentage of the amount approved by him and in turn paid by the City.[3] The payments to Kovic were made in cash by one of the owners of Marlin.

Of the ten defendants originally named in the indictment all but two were employees of the Police Department. Petitioner, Ronald Cavale, was one of the two defendants who was not. The other defendant, not an employee of the Police Department, was Richard Nawrocki. Nawrocki pleaded guilty prior to trial and testified as a government witness pursuant to a plea agreement with the government.

Your petitioner, Ronald Cavale, was a partner in Marlin when it was originally awarded a vendor contract

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[2] Most payments were made in cash. However, some Police Department employees received supplies and services as their share of the fraudulent authorized work.

[3] There was no intermediate procedure between Kovic's approval and payment to Marlin by the City.

with the City. (Tr. 1049) Although Marlin maintained a contract with the City for the following four years, Cavale's ownership interest in Marlin fluctuated during that period. About a year after the contract was awarded to Marlin, Cavale relinquished his interest in the partnership but continued to work for Marlin as an employee. (Tr. 1165) Approximately two years later Marlin was incorporated (Tr. 1264), and Cavale bought a fifty percent interest in the corporation. (R. 1277) He was also made an officer in the corporation. (Tr. 1297)

There was a pronounced disparity in the roles of Cavale and Nawrocki as participants in the schemes charged in the indictment. All of the schemes were devised and developed by Nawrocki and Police Department employees outside the presence of Cavale. (Tr. 1571, 1589) The money for pay-offs to Police Department employees was generated by writing checks on business accounts to "cash". Most, if not all, of these checks were written by Nawrocki. (Tr. 1061) Nawrocki, by his own testimony, made all of the payments to Police Department employees in furtherance of the schemes with one exception. (Tr. 1571) The payment in that instance involved a Marlin employee as a courier of cash. (Tr. 1323) The employee, later called as a witness, controverted the amount of money delivered and the purpose for which the money was delivered. (Tr. 2084) The overwhelming majority of building documents both legitimate and fraudulent were prepared by Nawrocki. (Tr. 1120) Of the 18,000 documents offered as evidence of the fraudulent schemes, twelve billing documents alleged to be inflated were in Cavale's hand. (Tr. 1316-1320)

Cavale's position, as announced in his counsel's opening statement, was that Cavale had no knowledge of the scheme. In his opening statement counsel stressed that billing documents, bookkeeping and check accounts were

Nawrocki's responsibility "with very very few exceptions". (Tr. 103) He characterized Cavale as the shop foreman. (Tr. 103) The opening statement contained numerous references to conversations Nawrocki and Cavale had alone. The jury was also told that they would hear Cavale's version of a meeting and what went on at the meeting. (Tr. 109)

After the government rested its case in chief (Tr. 2304), the defendants began to present their evidence. Several defense counsel were concerned with comments that the trial judge had made about how ". . . she would very seriously considered anybody who got on the stand and perjured himself". (Tr. 2499) The judge advised one defense counsel that her mistaken belief that his client had lied under oath had been satisfactorily "cleared up". (Tr. 2501)

Another defense counsel expressed his concern that after his client testified the government would subpoena as a witness another defendant, who had pled guilty during trial, grant him immunity, and elicit his testimony. (Tr. 2498-2509) This individual had not been previously available as a witness and his defense counsel had no idea what he would say. He was concerned that the immunized witness might in some way contradict the testimony of his client, and, if this client was found guilty, the judge would increase his client's sentence because of the contradiction. (Tr. 2502) This concern was "weighing heavily" on counsel's mind. (Tr. 2499) The judge, who had earlier that day, openly expressed her conclusion that another defendant was testifying untruthfully (Tr. 2421), assured this defendant's counsel that she would hold an evidentiary hearing prior to sentencing, if his client was convicted and she thought he had perjured himself. (Tr. 2502, 2503)

The judge then stated:

> THE COURT: How can I tell you that he has nothing to fear? I am telling you that if I perceive he perjured himself, I'm going to add substantially to his sentence. We are already talking about enormous sentences, and when I say substantial, I mean this man, whoever takes the stand is facing a significant sentence.
>
> Now I understand the interorum (sic) effect that has, I think it is a proper effect . . ." (Tr. 2506)

Shortly thereafter, the proceedings were adjourned for the day. (Tr. 2509)

The following morning, Cavale's trial counsel filed a motion in the trial court asking the judge to recuse herself, or in the alternative, order a mistrial.[4] There followed a colloquy between Cavale's counsel and the judge on the motion. (Tr. 2527-2540) The judge explained her statements as informing defense counsel of her sentencing philosophy. (Tr. 2527, 2530, 2531) Cavale's counsel argued that the only defense he had was the testimony of his client (Tr. 2532); he reminded the court that he had told the jury his client would testify (Tr. 2528), but the judge's remarks prevented his client from testifying. (Tr. 2523, 2525, 2526) The motion was denied.

Cavale did not testify at trial. The jury found him guilty on all counts. He was sentenced to three years incarceration.

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[4] The motion is attached hereto as Appendix B at pages A-27 to A-29.

REASONS FOR ALLOWANCE OF A WRIT OF CERTIORARI

The reasons your petitioner relies on in petitioning this Court to exercise its discretion and grant a writ of certiorari are twofold.

I.

The trial court's conduct, sanctioned by the Circuit Court of Appeals for the Seventh Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for this Court to exercise its supervisory powers. The remarks of the trial judge, when viewed in the context in which they were made, were coercive.

Although characterized, by the judge, as an expression of her sentencing philosophy and intended as an aid to the defense bar, these statements were made in midst of the presentation of the defense in a criminal proceeding. They were in part directed to a defense counsel's concern over whether his client should testify. The defendants were present and greatly effected by these remarks.

Additionally, the trial court's cautionary advice was substantially concurrent with her pronouncements that the testimony of a defendant was incredible. Her statements emphasized ". . . I'm going to add substantially to his sentence . . ." and "We are already talking about enormous sentences . . ." These admonishments convey the impression that the Court believed the defendants were guilty, that "enormous sentences" were appropriate and that a defendant who testified in his own behalf, to deny his guilt, would be committing perjury thereby substantially increasing his already enormous sentence.

It is submitted that these admonitions are a marked deviation from the proper and acceptable decorum of a trial court and call for this Court to exercise its power of supervision.

II.

A further reason for this Court to grant a writ of certiorari is that the Circuit Court of Appeals for the Seventh Circuit has decided the issue of the petitioner's right to due process of law and assistance of counsel for his defense is in conflict with the applicable law of this Court.

This Court has observed that the right to call a witness to establish a defense in a criminal case is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14 (1967).

This Court was confronted with a very similar situation in *Webb v. Texas*, 409 U.S. 95 (1972). There the trial judge admonished the only defense witness, *inter alia*: "If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve." (409 U.S. at 96). The witness then refused to testify for the defendant.

This Court reversed the defendant's conviction, and the rationale and language used by the Court are fully applicable at bar: (409 U.S. at 97, 98)

> The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth. Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present

> sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to carry out. Yet, in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge would well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.
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> * * * *
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> In circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment.

In *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) a co-defendant who had been acquitted was intending to testify for the defense. However, a secret service agent threatened him with a misprision of felony prosecution if he took the stand. The co-defendant thereupon declined to testify. The Court reversed and its reasoning, as in *Webb*, should be applied to the instant case (488 F.2d at 336).

> . . . the Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony. The result is that the misconduct of the Government directly produced an opportunity for the jury to draw prejudicial inferences from the fact that the witness failed to testify.

The circumstances in the case at hand are even more extreme than the facts presented in either *Webb* or *Thomas*, which prompted reversals. Here it was a defendant who was being severely and pointedly admonished

by the judge who would be imposing the sentence in the event of a conviction. The coercive nature of the court's remarks was both apparent and real. Under these circumstances, Mr. Cavale's decision not to testify can hardly be regarded as his free and voluntary choice. As in *Webb*, Mr. Cavale was effectively driven from the stand by his understandable fears that due consequences would follow if he were convicted. Such a scenario is not consistent with due process of law.

In his appeal to the Seventh Circuit Court of Appeals your petitioner maintained that the remarks of the trial judge infringed his right of effective assistance of counsel (appellant's Br. 3, 15). The Court did not address the issue in its opinion. However, it affirmed the trial court. The question should have been resolved in conformity with the law announced by this Court.

The decision of *Brooks v. Tennessee*, 406 U.S. 609 (1972), sheds considerable light on the attorney-client relationship as it pertains to whether (and when) a defendant should testify. In *Brooks*, this Court evinced a sharp displeasure with any rule (*Brooks* dealt with a State Statute requiring a defendant to testify before all other defense witnesses or not at all) which interfered with a defendant's unfettered exercise of his own free will in deciding whether to testify. (406 U.S. at 610)

In analyzing the issue in *Brooks*, this Court made reference to the right of the accused to the "guiding hand of counsel" (406 U.S. at 612, 613) as to whether or not to testify. The statute involved in *Brooks* was held to be in violation of that basic constitutional right. The statute in *Brooks* barred the defendant from testifying in much the same way that the language employed by the trial judge at bar prevented Cavale from testifying. What concerned this Court in *Brooks* was that the statute infringed upon

what should have been the unfettered choice of the defendant as to whether and when he should testify. The improper and threatening admonitions of the trial judge at bar likewise infringed upon Mr. Cavale's right to the "guiding hand of counsel." All counsel can do is advise; but the judge imposes the sentence. Mindful of this, Mr. Cavale's decision to take the stand was unduly and improperly influenced by the threatening remarks of the trial judge. The trial judge referred to the enormous sentences she was going to impose, and the substantial increase in the sentence of "whoever takes the stand." (Tr. 2506) Under these circumstances Mr. Cavale's decision whether to testify after consulting with counsel was no longer a free and voluntary decision, but instead was a choice greatly influenced by the threats of the trial court. In these circumstances the role of counsel became ineffective, contrary to what this Court has interpreted the constitution to guarantee.

CONCLUSION

For the foregoing reasons petitioner respectfully prays this Court grant a writ of certiorari.

Respectfully submitted,

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